88-1140

Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT W. LUDWIG, JR.,

Petitioner,

v.

EVERGREEN OVERLOOK, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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Question Presented For Review

Did the Maryland appeals court's extreme sanction of summary dismissal, because of petitioner's omission of pleadings from a record extract, on an appeal raising no issue of the pleadings, deny petitioner federal due process with respect to his state-created right of appeal in violation of the Due Process and Equal Protection Clauses of the U.S. Constitution, where the full record of the case, including the pleadings, was before the court, and where no rule of court mandated the inclusion of pleadings in the record extract in every appeal.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT	6
THE DECISION OF THE MARYLAND COURT OF SPECIAL APPEALS CONFLICTS WITH THE DECISIONS OF THE COURT REQUIRING THAT MINIMUM STANDARDS OF FEDERAL DUE PROCESS AND EQUAL PROTECTION BE SATISFIED WITH RESPECT TO A STATE-CREATED RIGHT OF APPEAL IN A CIVIL CASE	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
Aetna Life Insurance Co. v Lavoie, 475 U.S. 813 (1986)	10
Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., 275 U.S. 372 (1928)	11
Berman v. United States, 378 U.S. 530 (1964)	11
Bornstein v. State Tax Commission, 227 Md. 331, 176 A.2d 859 (1962)	7, 12
Eldwick Homes Association, Inc. v. Pitt, 36 Md. App. 211, 373 A.2d 957 (1977)	8
Evitts v. Lucey, 469 U.S. 387 (1985)	9, 10
Fallen v. United States, 378 U.S. 139 (1964)	11
Gmurek v. Kajder, 203 Md. 437, 101 A.2d 204 (1953)	7, 8
Houston v. Southwestern Bell Telephone Co., 259 U.S. 318 (1922)	8
Kemp-Pontiac-Cadillac, Inc. v. S & M Construction Co., 33 Md. App. 516, 365 A.2d 1021 (1976) . .	11
Lindsey v. Normet, 405 U.S. 56 (1972)	9, 10
Martin Marietta Aggregates v. Citizens, 40 Md. App. 26, 395 A.2d 179 (1978)	12
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976)	9, 10
Petite v. Homes, Inc., 184 Md. 377, 41 A.2d 71 (1945)	8
Platt v. Wilson, 191 Md. 371, 62 A.2d 191 (1948) . . .	8
Silverman v. Ruddle, 234 Md. 353, 199 A.2d 196 (1964)	8
Sullivan v. Insurance Commissioner, 291 Md. 277, 434 A.2d 1024 (1981)	10
Sunshine Laundry Corp. v. White, 197 Md. 582, 808 A.2d 1 (1951)	8
Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966) .	10

Velasco v. Protestant Episcopal Church, 200 Md. 634, 92 A.2d 373 (1953) 8

Wyndham v. Haines, 305 Md. 269, 503 A.2d 719 (1986) 11

CONSTITUTIONAL PROVISION AND STATUTES:

U.S. Const. amend. XIV, § 1 . . . . . 2, 9

28 U.S.C. § 1257(3) (1986) 2

28 U.S.C. § 2106 (1986) 7

RULES:

Md. Rule 1025 4

Md. Rule 1026 4

Md. Rule 1028 b., i. 2, 4, 5, 6, 11

Md. Rule 1035 a.2, b.5 . . . . . 2, 6

Sup. Ct. R. 23.1 7

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Opinions Below

The order of the Court of Appeals of Maryland denying petitioner's petition for a writ of certiorari to the Court of Special Appeals of Maryland appears in the appendix to this petition. (App. p. 4a). Also appearing in the appendix are the per curiam opinion of the Court of Special Appeals of Maryland (App. pp. 5a-6a), the mandate of that court entering a denial of petitioner's motion for reconsideration (App. p. 7a), the judgment of the Circuit Court of Prince George's County, Maryland (App. pp. 8a-9a), the order of that court denying petitioner's motion for reconsideration (App. p. 10a), and a subsequent judgment of that court. (App. pp. 11a-12a).

None of the foregoing decisions has been reported.[1]

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[1] The following persons and entities were parties before the Maryland Court of Special Appeals: Robert W. Ludwig, Jr. (appellant); and Evergreen Overlook, Inc., Residential Brokers, Ltd., Rocco Luppino, Judith H. Mullen, with John Cassidy, Kevin I. Gladd as substitute trustees (appellees). Evergreen Overlook, Inc. is a Maryland corporation wholly owned by Ms. Mullen. Residential Brokers, Ltd. is a Virginia corporation wholly owned by an officer of Evergreen Overlook, Inc.

Jurisdiction

On October 11, 1988, the Court of Appeals of Maryland denied petitioner's petition for a writ of certiorari to the Court of Special Appeals of Maryland. (App. p. 4a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3)(1986).

Constitutional Provision and Rules Involved [2]

Section 1 of the Fourteenth Amendment to the United States Constitution.

Rules 1028 b., i. and 1035 a., b. of the Maryland Rules of Procedure.

Statement of the Case

On May 12, 1985, petitioner signed a contract to purchase a new home in Prince George's County, Maryland from a developer, Evergreen Overlook, Inc. (hereinafter Evergreen), through its broker, Residential Brokers, Ltd. The contract was performed by Evergreen, although not signed by it, and settlement was scheduled for April 30, 1986 upon completion of the house. Just prior to settlement, the broker sent a notice of termination charging petitioner with breaches of contract, which the developer rescinded as unauthorized, as well as multiple revisions of a list of "extras", each one increasing the price of the house.

The broker and developer then refused to discuss or support the extras charged and threatened termination of the contract if petitioner failed to pay the increased price of the house at settlement, which they also refused to extend. Petitioner brought an action for declaratory relief, specific performance and fraud on the day of scheduled settlement.

Respondents made repetitive motions to dismiss petitioner's action, all of which were denied, and obtained continuances, some

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[2] The pertinent text of these provisions is set forth verbatim in the appendix. (App. pp. 1a-3a).

ex parte, which delayed trial until April 2, 1987. On that day, Evergreen announced that it no longer had title to the house, as its president, Rocco Luppino, had nine months before resigned from the corporation, paid off a construction loan on the property secured by a deed of trust, taken assignment of the note, and acquired title at his own foreclosure sale, paying about 60% of the fair market value of the house. The existence of the construction note and deed of trust was not disclosed during discovery, although the discovery requests made by petitioner should have resulted in production of these documents.

Granted leave, petitioner amended his complaint to add as parties Mr. Luppino and the owner of Evergreen, Judith Mullen, who was also its principal officer and attorney, with counts for fraud, tortious interference with contract, and punitive damages.

In a subsequent deposition (read at trial), Mr. Luppino admitted that the foreclosure was carried out as "the only way I could get a clear title from...this litigation that Mr. Ludwig had against us."

One week before trial, rescheduled to June 30, 1987, Evergreen filed a voluntary bankruptcy. Petitioner then went to the United States Bankruptcy Court for the District of Maryland to secure a lifting of the automatic stay. The day before trial, the stay was ordered lifted by Judge Friend of the federal court upon finding that the bankruptcy petition was filed "to avoid said trial [in state court] and for no other apparent purpose...."

At trial, the jury found petitioner's contract enforceable and binding, and Judge Bowen, a visiting circuit judge from Calvert County, Maryland, ordered specific performance by Mr. Luppino within sixty days. Judge Bowen had been assigned to the case after recusals by judges sitting in Prince George's County.

Judge Bowen also granted directed verdicts ("motions for judgment") dismissing petitioner's remaining claims, awarded interest to Mr. Luppino on the purchase money from the date of scheduled settlement (which was at that time $22,389), and allowed petitioner a $6,150 offset for rent collected, but denied

petitioner's requests for further relief. On August 26, 1987, Judge Bowen entered judgment, omitting the offset (App. pp. 8a-9a), and by separate order denied petitioner's motion for reconsideration. (App. p. 10a). [3]

On August 28, 1987, petitioner noted an appeal seeking review of seven questions: whether there was sufficient evidence in the trial record to preclude directed verdicts denying a jury trial on the claims of (1) fraud, (2) tortious interference, and (3) punitive damages. Petitioner also assigned as error the trial court's application of specific performance law which resulted in (4) an erroneous award of purchase money interest to respondents, and (5) denial of recoverable damages and (6) contract entitlements to petitioner; and (7) the failure to sanction respondents with costs and attorneys' fees for discovery abuse, repetitive motions, a concealed foreclosure, and a bankruptcy filing to avoid trial. (A copy of the table of contents to petitioner's brief, outlining these seven issues, appears in the appendix. (App. pp. 13a-14a)).

In accordance with Maryland Rules 1025 and 1026, the full record of the case was transmitted to the Maryland Court of Special Appeals.

On March 8, 1988, petitioner timely filed a detailed brief and a separate 464-page joint "record extract", required by Md. Rule 1028.

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[3] During the pendency of the appeal, petitioner's motion in the trial court to revise the judgment to include the offset was denied for lack of jurisdiction without prejudice to its refiling following the appeal. Petitioner's renewed motion, filed promptly upon the denial of certiorari by the Maryland Court of Appeals, was recently denied on December 30, 1988 by Judge Melbourne. Judge Melbourne further declared petitioner's specific performance award forfeited despite petitioner's arguments that performance had been inextricably tied to issues on appeal and stayed by the filing of a supersedeas bond, and entered a money judgment against petitioner in favor of Mr. Luppino in the amount of accrued interest, $39,786.48 (allowing the $6,150 offset for rent collected). (App. pp. 11a-12a). Mr. Luppino filed no affirmative motion or action for this relief, showed no damages, and holds title to the house whose appreciated value exceeds the interest award. This judgment in no way moots the issues raised here.

"*Rule 1028. Printed Record Extract in Civil Cases*", provides in pertinent part:

...

b. *Contents.*

1. *What to Be Included.* The printed extract shall contain such parts of the record as may *reasonably be necessary* for the determination of the questions presented by the appeal, and shall include:

(a) The judgment appealed from, together with the opinion or charge of the lower court, if any.

(b) So much of the evidence, pleadings or other parts of the record as is *material* to any question the determination of which depends upon the sufficiency of the evidence, pleadings or other matter contained in the record to sustain any action, ruling, order or judgment of the lower court.

...

Md. Rule 1028 b. (emphasis supplied).

The extract contained the papers mandated for every appeal, the judgment and charge below, in accordance with Md. Rule 1028 b.1(a), *supra*. It also contained the testimony of all witnesses, exhibits, colloquy, motions, orders and other parts of the record which were "material" or "reasonably necessary" to the seven issues raised, in accordance with Md. Rule 1028 b.1(b), *supra*. (A copy of the table of contents to the extract is appended. (App. pp. 15a-17a)). No issue of the sufficiency of the pleadings was raised by the parties either in their briefs, or at oral argument on May 11, 1988. The pleadings were not requested to be included by respondents, and were not included in the joint extract.

On May 20, 1988, the Court of Special Appeals of Maryland, following the argument and without reaching the merits, *sua sponte*, citing Md. Rules 1028 b.1, i.2 and 1035 a.2, b.5, without any order issuing from the court to include such pleadings in the "record extract," dismissed petitioner's appeal, on the ground that the pleadings were not included in the extract which the court deemed necessary to review the trial court's three directed verdicts on the claims for fraud, tortious interference, and punitive damages. (App. pp. 5a-6a).

The court did not refer to the four other issues remaining on the appeal. *Id.*

Petitioner's request for reconsideration and leave to supply copies of the pleadings, already in the record transmitted to the court, was denied. (App. p. 7a). Petitioner's petition below for a review of that decision by certiorari was denied by the Maryland Court of Appeals as not "desirable and in the public interest." (App. p. 4a).

The federal question sought to be reviewed here, denial of federal due process, was raised in petitioner's motion for reconsideration, which was denied without opinion by the Maryland Court of Special Appeals, and, together with a claim of denial of equal protection, in petitioner's petition for a writ of certiorari in the Maryland Court of Appeals and in the reply in support thereof, which was denied without opinion by Maryland's highest court. Pertinent portions of petitioner's motion, petition, and reply appear verbatim in the appendix. (App. pp. 18a-24a).

Reasons For Granting Writ

The Court of Special Appeals of Maryland arbitrarily and unjustly, in a plain abuse of discretion, and in violation of federal due process and equal protection denied petitioner his state-created right of appeal.

Despite the increasing volume of cases brought to the Court, many of which present important public issues, the Court has never dismissed as unimportant any denial of due process in the

hearing of a dispute, however modest, which a citizen has brought to his local courts to resolve. In past years where injustice or unfairness was apparent, which amounted to a denial of federal due process, the Court, pursuant to Rule 23.1 and 28 U.S.C. § 2106 (1986), by summary disposition has granted relief without full briefing and oral argument.

This petition presents such a case. The petitioner, a young lawyer, in the trial court, received partial relief in the form of specific performance consequent upon a favorable jury verdict, but his other claims were taken from the jury by the trial court on motions for directed verdict (motions for judgment).

Whatever the merits of petitioner's contentions as to his right of jury trial on those issues or on the other rulings of the trial court he complained of, petitioner had a state-created right to appeal those adverse rulings. Pursuing this state-created right, petitioner timely filed his notice of appeal which brought the full record of the case to the appeals court. Along with Maryland counsel, he prepared his brief and "record extract", including what is mandatory, and exercising judgment, as the Maryland rule provides, as to what is necessary for the appeals court to review his assignments of error, keeping in mind the admonition of the courts in Maryland that the extract should not be unduly voluminous and burdensome to the court and that only what is necessary should be included.[4]

Because he did not include his complaint in the "record extract", the court denied him review, although the complaint was contained in the record before the court. The court said: the "record extract is devoid of the pleadings necessary for us to review the trial court's actions," referring only to the three directed ver-

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[4] *See Gmurek v. Kajder*, 203 Md. 437, 101 A.2d 204, 206 (1953). *See also Bornstein v. State Tax Commission*, 227 Md. 331, 176 A.2d 859, 861 (1962)(stating "in many instances there is room for a perfectly justifiable difference of opinion as to what is necessary for the determination of a case, and we are not unmindful of the benefits of short records and of the elimination of nonessentials [,which] efforts...should be encouraged.")

dicts, "[h]ence, the extract provides us with nothing to review." (App. p. 6a). [5]

No Maryland reported decision has ever required that pleadings be included in the extract for an appeal that does not raise pleadings issues.[6]

No Maryland decision reports a summary dismissal where other issues remained on appeal.[7]

Having spent the time preparing his 464-page record extract, it would have been an easy matter to include additional pages covering the complaint and answers. *See* the mandate of the court spelling out the costs of petitioner's efforts to provide a complete extract. (App. p. 7a). However, considering the range of judgment embodied in the rule, and the admonitions of the court to include only what is necessary, petitoner and his counsel made the judgment that the pleadings were not necessary to the issues petitioner was bringing to the appeals court to review.

Whether the final pleadings in a case should be included in an "appendix" or "record extract" as a matter of course, which many

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[5] The court cited as case authority only *Eldwick Homes Association, Inc. v. Pitt*, 36 Md. App. 211, 373 A.2d 957 (1977), which makes no reference to the pleadings but involved a dismissal because the extract failed to include any of the evidence on which the appellant sought review. The court's opinion also gives undue emphasis to references in petitioner's appeals brief to "a complaint, an amended complaint, a supplement to the amended complaint, as well as the appellees' answers to each," (App. p. 6a)., found only in the "Statement of Facts" summarizing the involved history of the case, not in the "Argument."

[6] Decisions reviewing sufficiency-of-evidence issues on directed verdicts, as here, which are measured against the legal elements of the claim under state law, instruct counsel only that all of the material evidence must be included, *see Gmurek, supra* note 4, 101 A.2d at 206; *Silverman v. Ruddle*, 234 Md. 353, 199 A.2d 196 (1964); *Sunshine Laundry Corp. v. White*, 197 Md. 582, 80 A.2d 1 (1951); even where *no* extract was printed. *See Platt v. Wilson*, 191 Md. 371, 62 A.2d 191 (1948).

[7] The Maryland cases hold without exception that the appeal should not be dismissed if other questions are properly presented. *See Velasco v. Protestant Episcopal Church*, 200 Md. 634, 92 A.2d 373, 375 (1952); *Petite v. Homes, Inc.*, 184 Md. 377, 41 A.2d 71, 73 (1945). This rule is also followed in the federal courts. *See, e.g., Houston v. Southwestern Bell Telephone Co.*, 259 U.S. 318, 325 (1922).

experienced appellate practitioners do, it is nonetheless unconscionable and, it is submitted, unconstitutional to deny a citizen his state-created right of review of a case on the merits simply because, in the exercise of judgment, in compliance with a rule calling for judgment, he did not include in his "record extract" a pleading which was before the court in the transmitted record.

While the extreme sanction of dismissal is certainly justified for bad faith and flagrant disregard of court orders, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), it was a gross abuse of discretion and denial of federal due process to impose the extreme sanction of dismissal under present circumstances, thus denying petitioner his state-created right of appeal.

The action taken by the intermediate appeals court of Maryland is inconsistent with the standards of federal due process and equal protection established by the Court. The Court should grant petitioner's petition and summarily reverse the decision of the Maryland Court of Special Appeals dismissing the appeal, with instructions to hear the appeal upon petitioner's compliance with any orders of the appellate court regarding the contents of the record extract.

THE DECISION OF THE MARYLAND COURT OF SPECIAL APPEALS CONFLICTS WITH THE DECISIONS OF THE COURT REQUIRING THAT MINIMUM STANDARDS OF FEDERAL DUE PROCESS AND EQUAL PROTECTION BE SATISFIED WITH RESPECT TO A STATE-CREATED RIGHT OF APPEAL IN A CIVIL CASE

The Court has consistently held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Lindsey v. Normet*, 405 U.S. 56 (1972). If, however, a State has created appellate courts and afforded a litigant a right of appeal, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without

violating the Equal Protection Clause," *Lindsey*, 405 U.S. at 76, or the Due Process Clause. *Evitts,* 469 U.S. at 400-401, 403-405.

Recently the Court held that the Due Process Clause was violated when a a state appeals judge declined to recuse himself under the circumstances of that case which denied the litigant due process with respect to its state-created right of appeal. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

The highest court of Maryland has itself recognized that the right of appeal "'is a valuable right secured to parties, where they are vigilant, and not to be forfeited, unless where they are guilty of such laches as the law will not sanction.'" *Sullivan v. Insurance Commissioner,* 291 Md. 277, 434 A. 2d 1024, 1028 (1981)(citation omitted). Indeed, it has held that a summary dismissal of an appeal on less than such circumstances affects the "fundamental fairness of the proceeding" and "is a denial of due process." *Id.* at 1030.

The Federal Rules of Procedure offer guidelines of federal due process. While the Court has upheld dismissals of cases because of violations of procedural rules, the extreme sanction of dismissal has been upheld only in the case of flagrant, egregious or bad faith violations. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

As the Court held in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966):

> We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in

> court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice.

383 U.S. at 373. *See also Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co.*, 275 U.S. 372, 386-387 (1928); *Berman v. United States*, 378 U.S. 530, 537-538 (1964)(Black, J., dissenting); *Fallen v. United States*, 378 U.S. 139, 142 (1964).

The Maryland Court of Special Appeals could not and did not hold that the omission of pleadings from the extract was an egregious violation of the rule. Under the Maryland Rules, assuming a violation, the penalty imposed must be "appropriate", and dismissal is not allowed for mere inadvertence. Md. Rule 1028 i. provides in pertinent part:

> ...
>
> 2. *Violation of Section b.* For violation of section b. of this Rule this Court may require that additional portions of the record be printed or otherwise furnished, or it may dismiss the appeal, or make any other *appropriate* order with respect to the case.
>
> 3. *Inadvertent Errors.* Inadvertent omissions or misstatements in the printed extract or in any appendix may be corrected by direction of this Court on application or of its own motion.

Md. Rule 1028 i. (emphasis supplied).

The Maryland courts heretofore in reported decisions have adhered to these rules and constitutionally applied them, dismissing an appeal only for "egregious" violations of the rule. [8]

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[8] *See Wyndham v. Haines*, 305 Md. 269, 503 A.2d 719, 724 n.7 (1986). An egregious case under the reported Maryland decisions, consists of "numerous and serious" violations, or of omissions which are "'deliberate and intended to violate or evade the rule.'" *Kemp-Pontiac-Cadillac, Inc. v. S & M Construction Co.*, 33

In holding that pleadings were necessary to be included in the case at bar, the Maryland intermediate appeals court read into the rule an unwritten requirement that pleadings be included in the record extract in every appeal. The Maryland court provided no notice of such a requirement, and the requirement conflicts with that court's rule which specifies that which is mandatory in every appeal, and that which, in the judgment of the parties, is necessary for the court to decide the appeal. While recognizing that it is not this Court's role to pass on the correctness of a state court's *interpretation* of its own rules, this is a case in which the *application* of state rules unjustly deprives a state-created right of appeal in violation of federal due process.

Federal due process means, at the very least, that a citizen, who possesses a state-created right of appeal, should not be denied review on the merits of his appeal, unless by wilful violation or disregard of a court rule, he forfeits that right. In this case, with the full record before the court, the appeals court imposed the extreme sanction of dismissal *sua sponte,* after oral argument, without issuing, and providing an opportunity to comply with, an order or direction of the court that the pleadings should be included in the record extract.

This is not a case in which the litigant disregarded the rules. Indeed, he meticulously compiled a 464-page record extract of portions of the record he believed "reasonably necessary" or "material" to the questions on appeal in compliance with a court rule calling for judgment. The highest court of Maryland has recognized that there may be a "difference of opinion as to what is necessary for the determination of a case...." *Bornstein, supra* note 4, 176 A.2d at 861.

Whatever the merits of his appeal (and petitioner does not ask the Court to address the merits), petitioner has the constitu-

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Md. App. 516, 365 A.2d 1021, 1026 (1976) (citation omitted). *See also Martin Marietta Aggregates v. Citizens*, 40 Md.App. 26, 395 A.2d 179, 186 (1978) (holding it is "not appropriate" to dismiss "in the absence of prejudice to the appellees or a deliberate violation of the rules.")

tional right of due process to have the merits of his appeal heard, which procedural rules are designed to ensure.

It is respectfully submitted that the extreme sanction of dismissal for an omission in a record extract was, under the circumstances of this case, a denial of federal due process.

Conclusion

For the reasons set forth above, petitioner urges that this petition for a writ of certiorari be granted.

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Dated: January 9, 1989

Of Counsel:
CONDON & FORSYTH

CERTIFICATE OF SERVICE

I, Thomas J. Whalen, being over the age of 18 years and a member of the firm of Condon & Forsyth, hereby certify that I have this ninth day of January, 1989, served three copies of the foregoing petition for a writ of certiorari to the Court of Special Appeals of Maryland upon respondents Evergreen Overlook, Inc., et al., the only parties required to be served, by mailing such copies to their attorneys of record in sealed envelopes, first class postage prepaid, deposited at the United States Post Office, located at North Capitol and Massachusetts Avenue, N.E., Washington, D.C., and addressed as follows:

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APPENDIX

INDEX TO APPENDIX

	Page
Constitutional Provision and Rules Involved	1a
Order of Court of Appeals of Maryland Denying Petitioner's Petition for Writ of Certiorari dated October 11, 1988	4a
Opinion of Court of Special Appeals of Maryland Ordering Dismissal of Petitioner's Appeal dated May 20, 1988	5a
Mandate of Court of Special Appeals, dated June 21, 1988, Indicating Unwritten Order Denying Petitioner's Motion for Reconsideration, dated June 17, 1988	7a
Order of Judgment of Judge Bowen of Circuit Court of Prince George's County dated August 26, 1987	8a
Order of Judge Bowen Denying Petitioner's Motion for Reconsideration dated August 26, 1987	10a
Final Order of Judge Melbourne of Circuit Court of Prince George's County Denying Petitioner's Renewed Motion to Revise Judgement	11a
Table of Contents of Brief of Appellant (Petitioner) in the Court of Special Appeals of Maryland dated March 8, 1987	13a
Table of Contents of Petitioner's Record Extract in the Court of Special Appeals of Maryland dated March 8, 1987	15a
Excerpt of Petitioner's Memorandum of Points and Authorities in Support of Motion for Reconsideration in the Court of Special Appeals of Maryland dated June 14, 1988	18a

Excerpt of Petitioner's Petition for Writ of Certiorari in the Court of Appeals of Maryland dated July 6, 1988 . . . . . 20a

Excerpt of Petitioner's Reply in Support of Petition for Writ of Certiorari in the Court of Appeals of Maryland dated August 3, 1988 . . . . . 23a

Constitutional Provisions and Rules Involved

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules 1028 and 1035 of the Maryland Rules of Procedure provide in pertinent part:

> Rule 1028. *Printed Record Extract in Civil Cases.*
>
> a. *Appellant to Print.*
>
> In civil cases, unless a statement is filed pursuant to Rule 1029 b or unless otherwise ordered by this Court, the appellant shall cause to be printed, either as a separate volume or as an appendix to his brief, extracts of the record which shall include the parts thereof provided for by section b of this Rule arranged in the order in which the same appear in the record. . . .
>
> b. *Contents.*
>
> 1. What to be Included.
>
> The printed extract shall contain such parts of the record as may reasonably be necessary for

the determination of the questions presented by the appeal, and shall include:

(a) The judgment appealed from, together with the opinion or charge of the lower court, if any.

(b) So much of the evidence, pleadings or other parts of the record as is material to any question the determination of which depends upon the sufficiency of the evidence, pleadings or other matter contained in the record to sustain any action, ruling, order or judgment of the lower court.

(c) Such other parts of the record as may be designated by the parties pursuant to section c. of this Rule.

...

i. *Penalties - Correction.*

1. Violation of Section a.

For violation of section a. of this Rule this Court may dismiss the appeal, or make any other appropriate order with respect to the case, including an order that an improperly printed appendix or printed extract be reprinted at the expense of the counsel for the party whose appendix or printed extract was improperly printed.

2. Violation of Section b.

For violation of section b. of this Rule this Court may require that additional portions of the record be printed or otherwise furnished,

or it may dismiss the appeal, or make any other appropriate order with respect to the case.

3. Inadvertent Errors.

Inadvertent omissions or misstatements in the printed extract or in any appendix may be corrected by direction of this Court on application or of its own motion.

Rule 1035. *Dismissal of Appeal.*

a. *By the Court.*

1. From Pro Forma Orders.

...

2. Any Other Cause.

This Court may, on its own motion, dismiss an appeal for any cause set forth in section b of this Rule.

b. *On Motion.*

On motion filed by any party, an appeal may be dismissed for any of the following reasons:

...

5. The contents of the printed record extract do not comply with section b. of Rule 1028 (Printed Record Extract in Civil Cases).

...

ROBERT W. LUDWIG, JR.

v.

EVERGREEN OVERLOOK, INC., et al.

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 240
September Term, 1988

(No. 1515, September Term, 1987 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 11, 1988

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1515

September Term, 1987

ROBERT W. LUDWIG, JR.
v.
EVERGREEN OVERLOOK, INC., ET AL.

Gilbert, C.J.
Bloom,
Smith, Marvin H. (Retired,
specially assigned),

JJ.

PER CURIAM

Filed: May 20, 1988

Pursuant to Md. Rule 1035 a. 2 and b.5, we dismiss the appeal of *Ludwig v. Evergreen Overlook, Inc. et al.* We exercise the prerogative conferred upon us by Md. Rule 1028 i. 2, because the record extract required by Rule 1028 fails to include *any* of the pleadings in the action begun in the Circuit Court for Prince George's County.

Maryland Rule 1028 b. 1 provides:

" The printed extract shall contain such parts of the record as may reasonably be necessary for the determination of the questions presented by the appeal, and shall include:

> (a) The judgment appealed from, together with the opinion or charge of the lower court, if any.
>
> (b) So much of the evidence, pleadings or other parts of the record as is material to any question the determination of which depends upon the sufficiency of the evidence, pleadings or other matter contained in the record to sustain any action, ruling, order or judgment of the lower court.
>
> (c) Such other parts of the record as may be designated by the parties pursuant to section c. of this Rule."

Ludwig contends that the trial court erred in dismissing his claims for damages for fraud and tortious interference with a contract. Further, he claims punitive damages.

The record extract is devoid of the pleadings necessary for us to review the trial court's actions. In his brief, Ludwig refers to a complaint, an amended complaint, a supplement to the amended complaint, a second supplement to the amended complaint, as well as the appellees' answers to each. None of those writings are included in the record extract. Hence, the extract provides us with nothing to review. We have previously stated in *Eldwick Homes Association, Inc. v. Pitt*, 36 Md. App. 211, 212 (1977), "[W]e are not required to ferret out from the record those materials which counsel should have printed in the abstract." We reiterate what we said in *Eldwick*, and accordingly we dismiss the appeal.

APPEAL DISMISSED.
COSTS TO BE PAID BY APPELLANT

MANDATE
Court Of Special Appeals

No. 1515, September Term, 1987

Robert W. Ludwig, Jr.
v.
Evergreen Overlook, Inc. et al.

JUDGMENT: May 20, 1988: Per Curiam filed. Appeal dismissed. Costs to be paid by appellant.

June 15, 1988: Motion for Reconsideration filed by counsel for the appellant.
June 17, 1988: Motion for Reconsideration denied.

June 21, 1988: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for Prince George's County CAE86-06873

Record	40.00
Stenographer Costs	1342.25
* Total*	1382.25*

In Court of Special Appeals:

Filing Record on Appeal	50.00
Printing Brief for Appellant	187.20
Reply Brief	312.00
Portion of Record Extract-Appellant	2241.60
Total	2790.80*
Printing Brief for Appellee	153.60
Portion of Record Extract--Appellee	19.20
Printing Brief for Appellee Mullen and Evergreen	134.40
Total	307.20

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

ROBERT W. LUDWIG, JR.	:	
Plaintiff,	:	
vs.	:	Case No. CAE 86-06873
EVERGREEN OVERLOOK, INC. et al.	:	
Defendants.	:	

ORDER

UPON CONSIDERATION, of the testimony and evidence at the trial of this case, and the jury verdict on special issues, it is by the Circuit Court for Prince George's County, this 26th day of August, 1987,

ORDERED, that the Motions for Judgment by the defendants Mullen and Residential Brokers, be granted, and it is further,

ORDERED, that Judgment be, and it is hereby, entered in favor of the defendants Mullen, Residential Brokers, Cassidy & Gladd against the Plaintiff, Robert W. Ludwig, Jr., and it is further,

ORDERED, that the defendant which has legal title to the property known as Lot 7, Alexandria Overlook, Prince George's County, Maryland be, and is hereby, Ordered and directed to convey title to Robert W. Ludwig, Jr., upon payment by Robert W. Ludwig, Jr., to that defendant, the sum of $167,918.28, and it is further,

ORDERED, that Judgment be, and it is hereby, entered in favor of the defendant, conveying title, for interest at the legal rate on the $167,918.28 from May 1, 1986 to the date of settlement on this property, and it is further,

ORDERED, that Plaintiff's Motion for costs and counsel fees be, and it is hereby, denied, and it is further,

ORDERED, that Robert W. Ludwig, Jr. settle on this parcel of real estate, on or before August 31, 1987.

PERRY G. BOWEN, JUDGE

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

ROBERT W. LUDWIG, JR.	:	
Plaintiff,	:	
vs.	:	Case No. CAE 86-06873
EVERGREEN OVERLOOK, INC. et al.	:	
Defendants.	:	

ORDER

UPON CONSIDERATION of the Motion for Reconsideration filed herein and the Opposition thereto, it is by the Circuit Court for Prince George's County, this 26th day of August, 1987,

ORDERED that the Motion be and hereby is DENIED.

PERRY G. BOWEN, JUDGE
CIRCUIT COURT
PRINCE GEORGE'S COUNTY, MD

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

ROBERT W. LUDWIG, JR.	*	
Plaintiff	*	
	*	
vs.	*	Case No. CAE 86-06873
	*	
ROCCO LUPPINO, et al.	*	
Defendants	*	

FINAL ORDER

Upon consideration of Plaintiff's Renewed Motion to Revise Judgment, it is this 30th day of December, 1988, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that Plaintiff's Renewed Motion to Revise Judgment be, and hereby is, denied for lack of jurisdiction, and it is further,

ORDERED, that final judgment be, and hereby is, entered in favor of the Defendant, Rocco Luppino, against the Plaintiff, Robert W. Ludwig, Jr. for interest and costs, and it is further,

ORDERED, that a monetary judgment be entered against Robert W. Ludwig, Jr., in favor of the Defendant, Rocco Luppino in the amount of $39,786.48, which reflects interest and costs due to and through December 9, 1988. (The gross amount of $45,936.38 was reduced by a credit of $6,150.00 for rent received), and it is further,

ORDERED, that this judgment will continue to accrue interest at the legal rate until settlement on the property, and it is further,

ORDERED, that the Plaintiff, Robert W. Ludwig, Jr., has forfeited any right to purchase the property located at 17 East

Alexandria Drive, Oxon Hill, Maryland, and Rocco Luppino may sell, transfer, or convey the real property free of any lien, or claimed lien, of Robert W. Ludwig, Jr.

/s/Audrey Melbourne,
JUDGE

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IN THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF APPELLANT

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS . . .	3
STATEMENT OF FACTS	3
ARGUMENT	16
I. THE TRIAL COURT ERRED IN GRANTING MOTIONS FOR JUDGMENT DISMISSING APPELLANT'S CLAIMS FOR FRAUD, TORTIOUS INTERFERENCE AND PUNITIVE DAMAGES	16
A. Sufficient Evidence of Fraud Was Offered Against Appellees	17
B. Sufficient Evidence of Tortious Interference Was Offered Against Appellees Luppino, Mullen and Residential	21
C. Sufficient Evidence of Malicious, Willful And Wanton Conduct Was Offered Against Appellees To Sustain Punitive Damages	23
II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN APPLYING SPECIFIC PERFORMANCE LAW	26
A. Appellant Should Not Have Been Ordered To Pay Purchase Money Interest	26
B. Recoverable Expenses Should Have Been Awarded to Appellant	29

C. The Contract At Issue And Found Valid By The Jury Was That Dated May 12, 1985 And Appellant's Rights Thereunder To Inspection, Punch-list Completion And Closing Costs Should Have Been Enforced 30

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR COSTS AND ATTORNEYS' FEES 32

CONCLUSION 34

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

RECORD EXTRACT

TABLE OF CONTENTS

	Page
Order of Judgment	1
Order denying Motion for Reconsideration	3
Charge and Opinion of the Court Below	4
Text of Rule 1085 and Rule 1-341	21
Plaintiff's Motion For Reconsideration	22
Plaintiff's Supplemental Trial Memorandum in Support of Award of Costs and Attorneys' Fees	30
Order Granting Ex Parte Motion for Relief from Stay of the U.S. Bankruptcy Court for the District of Maryland	40
Letter of Robert W.Ludwig, Jr. to the Court Below dated July 14, 1987	43
Exhibits at Trial	
Exhibit 5 Sales Contract dated May 12, 1985	45
Exhibit 16 Young's First List of Extras	58
Exhibit 17 Young's Second List of Extras	59
Exhibit 18 Young's cancellation letter dated April 11, 1986	62
Exhibit 19 Ludwig letter dated April 16, 1986	64
Exhibit 20 Mullen Letter dated April 17, 1986	66
Exhibit 21 Mullen letter dated April 18, 1986	67
Exhibit 22 Young letter dated April 19, 1986	68
Exhibit 23 Notice of lease termination dated March 27, 1986	69
Exhibit 25 Mullen letter dated April 22, 1986	70
Exhibit 26 Ludwig letter dated April 24, 1986	71

Exhibit 27 Mullen letter dated April 24, 1986 . . . 76
Exhibit 30* Plaintiff's summary of costs receipts and Exhibits A-P (See Exhibit 36) 77
Exhibit 36 Exhibits A-P to Exhibit 30 81
Exhibit 37* Mullen letter dated May 9, 1985 147
Exhibit 39* Maryland National Bank letter dated July 22, 1985 149
Exhibit 42 Storage contract 156
Exhibit 43 Moving contracts 162
Exhibit 44 Phone hook-up bill 165
Exhibit 49 Flooring contractor's invoice 172
Exhibit 50 Bricklayer's cost receipt 173

Transcript of Trial on June 30, 1987 174
Colloquy 175

Plaintiff's Witnesses:
Testimony of Robert Ludwig - Direct 177
- Cross 236
- Redirect . . 250
Testimony of Richard Donato - Direct . . . 252
Reading of Rocco Luppino deposition 261
Reading of Judith Mullen deposition 268
Reading of Rocco Luppino deposition 278
Testimony of Judith Mullen - Direct 280
- Cross 289
- Redirect . . 291
Reading of Michael Young deposition 293
Reading of Richard Kische deposition 297

Colloquy 300

Transcript of Trial on July 1, 1987 316
Colloquy 317

Testimony of Robert Ludwig - Direct 329
- Cross 348
- Redirect . . 358

Defendant's Witnesses:
Testimony of Judith Mullen - Direct 360
- Cross 367

Testimony of Richard Kische	- Direct	378
	- Cross	404
	- Redirect . .	422
Testimony of Michael Young	- Direct	424
	- Cross	426
Testimony of Rocco Luppino	- Direct	428
	- Cross	437
Rebuttal Witnesses:		
Testimony of Robert Ludwig	- Direct	447
Further Witnesses:		
Testimony of Judith Mullen	- Direct	460
	- Cross	461
Colloquy		462

*Exhibits not admitted into evidence

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

ROBERT W. LUDWIG, JR.	*	
Appellant	*	
	*	
v.	*	No. 1515
	*	
EVERGREEN OVERLOOK, INC., ET AL.	*	September Term
Appellees	*	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION

I. The Court Has Before It In The Record Extract Sufficient Information With Which To Render A Decision.

...

II. Appellant Stands Ready, Willing And Able To Supplement The Record Extract Immediately Upon The Granting Of This Motion For Reconsideration.

...

III. To Dismiss This Appeal Would Work A Substantial Injustice Upon Appellant.

...

To allow Appellant to supplement the record extract would work no prejudice upon any of the parties hereto or to the Court. Where appellee has suffered no injury or where the appeal presents other questions which do not depend on the alleged defects, the appeal should not be dismissed. *Gwynn Oak Park v. Becker,* 177 Md. 528, 10 A.2d 625, 627 (1940); *Velasco v. Protestant Episcopal Church,* 200 Md. 634, 92 A.2d 373, 375 (1952). *Also see Sullivan v. Insurance Commissioner,* 291 Md. 277, 434 A.2d 1024 (1981), which provides that the right of appeal "is a valuable

right secured to the parties, where they are vigilant, and not to be forfeited, unless were they are guilty of such laches as the law will not sanction..." 291 Md. 277, 434 A.2d at 1028. Dismissal on less than such circumstances affects the fundamental fairness of the proceedings and is a denial of due process. *Id.*, at 1030.

...

Respectfully submitted,
BLANK & MOORSTEIN

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IN THE COURT OF APPEALS OF MARYLAND

ROBERT W. LUDWIG, JR.	*	
Petitioner	*	
	*	September Term, 1988
v.	*	
	*	Petition Docket No. 240
EVERGREEN OVERLOOK, INC., et al.	*	
Respondents	*	

PETITION FOR WRIT OF CERTIORARI

. . .

III. THE DISMISSAL DENIES PETITIONER A VALUABLE RIGHT TO APPEAL AND APPLIES MD. RULE 1028 IN A MANNER WHICH DENIES DUE PROCESS

The right of appeal "'is a valuable right secured to parties, where they are vigilant, and not to be forfeited, unless where they are guilty of such laches as the law will not sanction.'" *Sullivan v. Insurance Commissioner*, 291 Md. 277, 284, 434 A.2d 1024 (1981). Dismissal on less than such circumstances affects the "fundamental fairness of the proceeding" and "is a denial of due process." 291 Md. at 287.

As in *Sullivan* and its companion cases, *Uhler v. Real Properties, Inc.*, 289 Md. 7, 421 A.2d 966 (1980) and *Ayre v. State*, 291 Md. 155, 433 A.2d 1150 (1981), reversing the lower court's erroneous application of Md. Rules 1013, 1025 and 1035, the lower court has again misapplied an important Maryland Rule. The dismissal would have been harsh even if *mandatory* material had been omitted from the extract. In this case, however, where all mandatory material was supplied, the result is exceedingly harsh and unjustified for a Rule which leaves much to the discretion of counsel and has never been applied to require pleadings in all cases.

The result reached thus also constitutes a misapplication of Md. Rule 1028 i.2 and Md Rule 1035 a.2 and b.5 under which the lower court exercised its discretion to dismiss the appeal. As this Court has applied its corresponding rules in a long line of cases culminating in *Wyndham v. Haines*, 305 Md. 269, 503 A.2d 719 (1986), "the sanctions for violation of Rule 828 b [identical to 1028 b] as provided by Rule 828 i2 [1028 i2] are discretionary," and dismissal is unwarranted except in "egregious" cases. 305 Md. at 277 n.7. Exercising traditional caution, the Court therein declined to dismiss for alleged failure to include a part of the record. *See also Colonial Carpets, Inc. v. Carpet Fair, Inc.*, 36 Md. App. 583, 593, 374 A.2d 419 (1977) ("instant case ... does not present [an] 'egregious omission' ... of such magnitude as to require a summary dismissal"); *Anderson v. Hull*, 215 Md. 476, 482, 138 A.2d 875 (1958) ("appellants' derelictions were [not] so serious as to call for a dismissal").

Such application of the Rules by the Court of Special Appeals constitutes an unconstitutional denial of due process. As has been recognized by a sister court:

> Although the State is not constitutionally required to provide a right to appellate review, once the State chooses to provide such a right it must comply with the dictates of the constitution, including the requirements of due process. *See Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 838-39, 83 L.Ed.2d 821 (1985); *see also Lindsey v. Normet*, 405 U.S. 56, 77, 92 S.Ct. 862, 876, 31 L.Ed.2d 36 (1972).

Ladd v. Coleman, 517 A.2d 811, 813 (N.H. 1986). Due process requires that once a state has created a right of appeal, it must offer each litigant "a fair opportunity to obtain an adjudication on the merits." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985). *See also Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986), *rev'd on other grounds*, __ U.S.__, 107 S.Ct. 1519 (1987). Recently this Court, citing *Texaco* and acknowledging this constitutional argument, interpreted Md. Rule 1018 in accordance with "the familiar principle that a rule will be construed to avoid

a possible conflict with the Constitution whenever that course is reasonable." *O'Donnell v. McGann,* 310 Md. 342, 529 A.2d 372, 376 (1987).

A right of appeal otherwise given also may not be arbitrarily denied. *See Lindsay v. Normet,* 405 U.S. 56, 77 (1972)("When an appeal is afforded..., it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.") Under the Maryland reported decisions, even egregious violations of the applicable rules have not resulted in dismissal. *See Nisos v. Nisos*, 60 Md.App. 368, 375-76, 483 A.2d 97 (1984).

The trial judge in this case erred in denying Petitioner the right ot jury trial secured by Article 23 of the Maryland Declaration of Rights and by the Seventh Amendment of the U.S. Consitution. The error was compounded when the Court of Special Appeals subsequently dismissed the appeal, upon a misapplication of the applicable rules, thus denying Petitioner further rights guaranteed by Article 24 and by the Fourteenth Amendment. In order to avoid irreparable injury to Petitioner and to other litigants, Petititoner urges this Honorable Court to construe the Maryland Rules in a sensible manner so as not to render the appeal process fundamentally unfair and meaningless.

Respectfully submitted,
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IN THE COURT OF APPEALS OF MARYLAND

ROBERT W. LUDWIG, JR.	*	
Petitioner	*	
	*	September Term, 1988
v.	*	
	*	Petition Docket No. 240
EVERGREEN OVERLOOK, INC. et al.	*	
Respondents	*	

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

...

Petitioner's valuable right of appeal and to due process was lost through a clear abuse of discretion. If the court below required the pleadings, Petitioner should have been afforded relief under Rules 1028 i.2 and .3 and 1050 to furnish them, and in any event should have received a review of the other half of his appeal.

CONCLUSION

The issues in this matter affect not only the Petitioner but members of the Maryland Bar who practice in the Courts under these Rules, and thus are of general public importance. The problem of providing a concise yet adequate extract is a recurring one, and cases frequently arise where professional judgment is exercised in conscientious attempts to comply with the Rules. It is unconscionable that a citizen's right of appeal should be foreclosed despite conscientious efforts, when appropriate avenues are available to correct an omission in the record. The disposition of the court below should be corrected by the Court by a sensible and fair application of its Rules, consistent with the

public interest and its supervisory responsibility to see that its Rules are respected and followed.

Respectfully submitted,
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